LAW COMMISSIONS ACT 1965

Scottish Law Commission
First Annual Report

For the year ended 15th June, 1966

Laid before Parliament
by the Secretary of State for Scotland and the Lord Advocate
under Section 3(3)
of the Law Commissions Act 1965

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SCOTTISH LAW COMMISSION

Report for year ended 15th June, 1966

To: THE RIGHT HONOURABLE WILLIAM ROSS, M.B.E., M.P.,
Her Majesty's Secretary of State for Scotland, and

THE RIGHT HONOURABLE GORDON STOTT, QUEEN'S COUNSEL,
Her Majesty's Advocate.

In accordance with the provisions of section 3(3) as read with section 6(2) of the Law Commissions Act 1965, we have the honour to submit this the first Annual Report of the Scottish Law Commission.

C. J. D. SHAW,
Chairman.

16th June, 1966.

THE COMMISSION

1. The Commission was set up on 16th June, 1965, with a full-time Chairman, The Hon. Lord Kilbrandon, LL.D., and three part-time Commissioners, Mr. G. D. Fairbairn, S.S.C., Professor J. M. Halliday, M.A., LL.B., and Professor T. B. Smith, Q.C., M.A., D.C.L., LL.D., F.B.A. On 11th April, 1966, Professor A. E. Anton, M.A., LL.B. was appointed as the fourth part-time Commissioner.

PREMISES

2. Until 11th January, 1966, the office of the Commission consisted of three, and latterly four, rooms at 1 Grosvenor Crescent, Edinburgh, the premises of the Scottish Land Court. While this was an arrangement the temporary nature of which handicapped us to some extent in setting up our office organisation, we should like to take this opportunity to express our thanks to the Chairman, Members and Staff of the Scottish Land Court for their co-operation and assistance while we occupied part of their premises. On 11th January, 1966, we moved into our permanent office accommodation at the Old College in the University of Edinburgh, and we wish to record our appreciation of the preparatory work done in this connection by all the Government Departments involved and by the staff of the University. We are grateful to the University for making this accommodation available. The arrangement to accommodate us in this building is a happy one; it has enabled us to establish close ties with the University which we hope to strengthen in the future. These ties are certainly to our advantage and, we hope, may be to the advantage of the University as well.

STAFF

3. Until we moved into our permanent premises our legal staff consisted of our Secretary and Assistant Secretary (two lawyers assigned to us from the Office of the Solicitor to the Secretary of State for Scotland). Since January, 1966 we have had the benefit of the services of two other lawyers from that office. At an early stage in our deliberations we came to the conclusion that

adequate research—analytical, historical and comparative—was an essential preliminary to our consideration of any aspect of the law with a view to its reform. In addition, we found that problems which were being raised with us by the Law Commission and, in connection with current legislation, by your Departments, called for much time-consuming work in examining the law of Scotland, and in comparing the law on certain matters on each side of the Border. Legal research and work of this nature takes a long time to complete and cannot be hurried; because of this we felt that there was a distinct danger that dissipation of our resources on what we would call day-to-day matters would seriously delay our progress with the examination of the branches of the law in our First Programme, to which we refer later in this Report. For this reason, we asked for further qualified staff, and we hope that by the autumn of this year we shall have one more lawyer, if not two, in post.

4. By section 3(1)(c) of the Law Commissions Act we are enjoined to formulate our proposals for law reform "by means of draft Bills or otherwise". We should prefer to do so, in general, by means of draft Bills, for in this way we can best be assured that our proposals can be translated into workable legislation. Clearly, however, this method of formulation, desirable though it is, will not be possible unless at least one team of Parliamentary Draftsmen can be allocated exclusively for this work. We are informed that with the present complement of Parliamentary Draftsmen this will not be possible and, further, that even if the complement were increased there would be small likelihood of attracting recruits of the right calibre on the conditions at present offered. In addition, some time would inevitably elapse in increasing the total resources of *experienced* Draftsmen. In these circumstances we intend to put forward our proposals for the time being in such a form that they can be used as a basis for instructions for the Parliamentary Draftsmen. We would, however, like to bring to the attention of the Departments concerned our view that matters should be so arranged as to increase at the earliest possible moment the resources of experienced Draftsmen to the extent necessary to allow for the allocation of one team exclusively to the preparation of Bills for giving effect to our proposals. The foregoing relates to the drafting of Bills to give effect to our proposals for law reform. Under section 3(1)(d) we are also enjoined to prepare drafts of purely consolidation Bills applying to Scotland only. For this purpose one whole-time and one part-time Parliamentary Draftsmen have been allocated and with this allocation steady, though slow, progress is being made in this field. It should not be thought, however, that the allocation of these Draftsmen in any way meets the need for drafting resources to be made available for the preparation of law reform Bills. Nor, of course, does it cater for the Scottish aspect of consolidation Bills applying to other parts of the United Kingdom as well as to Scotland.

5. We have also a small executive, clerical and typing staff, amounting to nine in all who are seconded to us from the Scottish Home and Health Department and whose assistance to us is invaluable.

Meetings

6. Until September, 1965 we were not able to meet regularly owing to prior engagements of our part-time Commissioners, but since then it has been our aim to meet in full session at not less than fortnightly intervals. We have held in all eighteen such meetings.

7. In addition, we have had meetings of some but not all the Commissioners to discuss particular subjects. In January, 1966 a meeting between the two Law Commissions was held for the discussion of matters of common interest. The Law Commission did us the honour to visit us in Edinburgh, and a conference lasting a day and a half was held in premises kindly made available by the University. The Commissions were hospitably entertained by the University, at the invitation of the then Acting Principal, (now the Principal) Professor Swann. In May, 1966 the Scottish University teachers of law held a weekend conference on law reform at The Burn, Edzell and were kind enough to invite the Chairman of each Commission to take part. Our Chairman has also had meetings with the Law Commissioners in London.

FUNCTIONS OF THE COMMISSION

8. The duties of the Commission may be summarised in the words of section 3(1) of the Law Commissions Act 1965 as being "to take and keep under review all the law with which" we are concerned "with a view to its systematic development and reform".

9. We are concerned with all the law of Scotland, and we do not consider that we are in any way confined to what is loosely referred to as "lawyers' law". All law has social implications, and it is impossible to draw any dividing line between "social law" and "lawyers' law". We interpret the terms of the Act as imposing on us a duty to see to the development and reform of *all* the law systematically. Our intention is that when any question of social policy arises in connection with any branch of law with which we are dealing, we shall draw attention to it and express our views upon it so far as it affects the legal point under consideration. The decision upon it will be a matter for others—ultimately for the Government of the day.

10. Section 3(1) of the Law Commissions Act goes on to set out matters which, in particular, it is our duty to consider—"codification", "elimination of anomalies", "repeal of obsolete and unnecessary enactments", "reduction of the number of separate enactments" and "generally the simplification and modernisation of the law".

11. Initially, we carefully considered whether our ultimate aim should be complete codification, but while we could see that there was a need for this in a number of fields, we decided not to commit ourselves to it in advance, lest we should fall into the error of codifying simply for the sake of codification. Our aim, therefore, is to codify those branches of the law which, on examination, appear to be in need of such treatment. For example, as we indicate later in this Report, we are proceeding with the examination of the law of evidence with a view to the ultimate preparation of a code.

12. With regard to "elimination of anomalies", our intention is to try to make recommendations about these as they come to our notice, always bearing in mind that our reform of the law must be systematic; there may be cases in which particular anomalies are better left untouched until the whole branch of the law in which they arise can be examined. There is always a danger that the removal of one anomaly may create another.

13. Work on the repeal of obsolete and unnecessary enactments has been going on for many years under the auspices of the Statute Law Revision Committee; it is our concern to ensure that this work continues and, so far as is possible with the available resources, proceeds at an even faster rate.

14. A large number of separate enactments on each subject is one of the results of our present system of legislation; this makes our statute law much more complicated than it need be. Part of the cure for this may be codification and part may be consolidation of enactments; but it may well be that what is required is a completely new system of the arrangement of statutory enactments and a new method of publishing what Parliament has enacted. This is a matter to which we have not had time as yet to give full consideration, and it is also a matter which we shall have to consider in close co-operation with the Law Commission. Modernisation is part of this problem, and in this connection we are keeping in touch with developments in legal techniques both at home and abroad. We have in mind experiments in the use of computers for research purposes.

15. In section 3(1) of the Law Commissions Act 1965, Parliament set out in detail the various methods by which the two Law Commissions are to carry out the duties generally prescribed for them, and in the following paragraphs we set out what we have done in employing each of these methods.

Section 3(1)(a)—"to receive and consider any proposals for the reform of the law which may be made or referred to them;"

16. At our first meeting we decided to invite the legal profession and the public generally to bring to our notice proposals for reform of the law. Our invitation to the public received generous publicity from the press and from the radio and television authorities. We also wrote to the principal legal organisations, including all the local faculties and societies, inviting their co-operation in this respect. We sent similar invitations to the Scottish Lords of Appeal in Ordinary, the Judges of the Court of Session, the Chairman of the Scottish Land Court, the Convener of the Sheriffs and the Law Faculties of the Scottish Universities.

17. We were particularly anxious in the early stages to try to ascertain which branches of the law were thought to be in most urgent need of examination, but we emphasised that we were ready to receive notice of any point, however small, which appeared to call for reform.

18. We keep a record of proposals made to us and the following table shows the sources from which they have been received—

Proposals received

Source	*Number*
General Public	49
Legal Faculties and Societies	27
The Judiciary	14
Other lawyers	14
Other organisations	15
Government Departments	55
Members of the Commission and Staff	19
	193

19. These proposals have been dealt with as follows—

To be examined under our First Programme	49
To be examined under future Programmes	53
To be considered with a view to legislation in a Law Reform (Miscellaneous Provisions) (Scotland) Bill	10
Referred to, or deferred pending reports of, other bodies concerned with law reform (e.g. the Grant Committee on the Sheriff Courts and the Halliday Committee on Conveyancing)	13
Awaiting further information	14
Considered to require no action on the part of the Commission	51
Awaiting consideration	3

20. The two main reasons for rejecting proposals were, firstly, that the proposals were based on incorrect statements of existing law, and secondly, that the proposals related to matters not within the scope of our functions under the Law Commissions Act.

21. We have been pleased by the number of proposals received from the general public and from non-legal organisations. Very few have come from obvious "cranks", but many have come from people who have themselves suffered from what seems to them to be a defect in our law. A large majority have contained suggestions for reform that are well worth consideration. Some of them we have been able to consider in isolation, but most of them have been noted for consideration when the branch of law to which they are related comes under examination by the Commission.

22. In contrast, we were a little disappointed at the response from the legal profession. We wrote to 38 legal faculties, societies and associations inviting them to say which branches of the law were, in their view, in greatest need of examination, and also to bring to our notice any anomalies or defects in the law which require to be dealt with. Of these 38, only 15 replied and from these only 9 made a total of 27 proposals to us. It may be that a number of the individual lawyers who sent us proposals were prompted to do so by the letter to their respective professional organisations, but we feel that the organisations themselves have a great part to play in the process of law reform.

23. We realise that as the Commission has been established for only a year, there has not yet been much time for the profession to prepare proposals for us. We are grateful to those who have managed to do so and we look forward to receiving a greater number from the profession in the future. Indeed, we know that several legal bodies have memoranda in preparation for submission to us.

24. We appreciate that the busy practitioner has little time to devote to matters of reform—his prime concern is with the law as it is—but, of course, it is the practitioner who is best placed to see the defects in the law in the course of his practice and it is to him that we must look for co-operation in bringing these to our notice. It is only fair to acknowledge here that as mentioned in paragraph 38 below, we have received, and are grateful for, most helpful co-operation by way of advice from both branches of the profession.

Section 3(1)(b)—"to prepare and submit to the Minister from time to time programmes for the examination of different branches of the law with a view to reform, including recommendations as to the agency (whether the Commission or another body) by which any such examination should be carried out;" and

Section 3(1)(c)—"to undertake, pursuant to any such recommendations approved by the Minister, the examination of particular branches of the law and the formulation, by means of draft Bills or otherwise, of proposals for reform therein;"

25. It was one of our first tasks to prepare a programme of branches of the law for examination and we submitted our First Programme on 16th September, 1965. As we explained in the Memorandum submitted with that Programme, it was only a first programme on which we thought we should begin our work, and we intended to prepare further programmes when we had received further proposals from all sources. We hope to be in a position to submit our Second Programme within the next few months.

26. The reasons for our choice of branches of law for the First Programme are set out in the Memorandum which accompanied it, and it is, perhaps, unnecessary to elaborate them here. We proposed to examine these branches of law ourselves, and the work of examination is proceeding. The first two items, "Evidence" and "Obligations" are obviously long-term projects, and it will be a considerable time before we shall be in a position to make systematic recommendations in respect of them. "Prescription and the Limitation of Actions" presents a narrower field of inquiry, and we hope that we may be able to complete our examination and prepare our recommendations in respect of this branch of the law within the next year.

27. With regard to "Judicial Precedent" we have already come to certain preliminary conclusions and, as a first step, we have suggested that the law and practice relating to the authority of House of Lords decisions as precedents in appeals to that House should be clarified.

28. The subject of "Interpretation of Statutes" is one on which we are working in close co-operation with the Law Commission; the consideration of this subject is linked with the wider question of the possible revision of the form of statutory enactment to which reference is made in paragraph 14 above, and also with the rules which may govern the interpretation of "Codes". These rules will be in kind very different from those which the Courts, the profession, and the general public are now accustomed to apply to the interpretation of statutes.

29. We have set up small teams of Commissioners and professional staff to do the initial work on each of the subjects. In one project, that is the codification of the law of contract, we and the Law Commission have set up a joint committee with a view to unification or, at least, harmonisation of the law on each side of the Border. We have also, jointly with the Law Commission, set up a working party on "exemption provisions in standard form contracts"; we are grateful to those from outside the Commissions who have agreed to serve on this working party.

Section 3(1)(d)—"to prepare from time to time at the request of the Minister comprehensive programmes of consolidation and statute law revision, and to undertake the preparation of draft Bills pursuant to any such programme approved by the Minister;"

30. At your request we prepared a Programme of Consolidation and Statute Law Revision, which has received your approval.

31. There is little we can add on the subject of consolidation and statute law revision to what is said in the memorandum attached to that Programme. The work, to which we refer in paragraph I.1 of our Programme as being already started, has been continued and some progress has been made. So far as the consolidation of enactments relating to Scotland only is concerned, (paragraph I.2 of the Programme), work has already been begun on the Lands Clauses Acts.

Section 3(1)(e)—"to provide advice and information to government departments and other authorities or bodies concerned at the instance of the Government with proposals for the reform or amendment of any branch of the law;"

32. This is one of our functions which has taken up a great deal of our time. We have been consulted by Government Departments about Bills in Parliament, and in particular (a) whether, in relation to Bills which do not apply to Scotland, we consider that similar legislation for Scotland is necessary or desirable, and (b) whether certain provisions which are proposed for both sides of the Border are appropriate for Scots law.

33. We have provided information on Scots law to the Committee on the Age of Majority under the chairmanship of the Hon. Mr. Justice Latey. Our Chairman was a member of the United Kingdom delegation at the Fourth Conference of European Ministers of Justice in Berlin in May, 1966, and Professor Anton was one of the United Kingdom representatives at the Hague Conference on Private International Law in April, 1966. In February, 1966 a member of our professional staff attended, at the request of the Foreign Office, meetings at Strasbourg of the Sub-Committee on Fundamental Legal Concepts of the European Committee on Legal Co-operation of the Council of Europe, the subject under consideration being "Time Limits". In this connection we wish to say that we wholeheartedly endorse the policy of sending, wherever possible, Scottish as well as English lawyers to represent the United Kingdom at conferences of this kind, and we welcome the opportunity to present the solutions of Scots law as a possible link between the civilian systems of Europe and the "common law" systems of England, of most of the Commonwealth and of the United States.

34. Besides being in close communication with the Law Commission on matters of common interest to both Commissions, we have been consulted by the Law Commission in connection with branches of law which they are examining but in respect of which we have no similar examination at present in mind. In the main, this involves us in providing information to the Law Commission as to the law of Scotland on particular matters and in considering whether, if the Law Commission's proposals were implemented, any corresponding change in the law of Scotland would be called for.

35. As part of our duty under this subsection we have advised on matters which might be suitable for legislation in a Law Reform (Miscellaneous Provisions) (Scotland) Bill. The Bill currently before Parliament contains one item proposed by the Commission (Clause 9), and we have been consulted on certain other points which arose in connection with the Bill. We shall also be advising as to matters which might be dealt with in future Bills of this kind. We would hope that it will be possible for a Bill of this kind to be presented annually. Usually these matters come to our notice either in the course of our examination of "programme" subjects, or as separate proposals from inside or outside the Commission. They are anomalies or defects in the law which appear to us to call for urgent attention and to be capable of being remedied by comparatively short amending provisions. If we come across an anomaly or defect which cannot be removed or cured by such an amendment, we may advise the presentation of a separate Bill to deal with the matter. There is also the possibility in some cases that an anomaly or defect to which we draw attention can be removed, without legislation, by administrative action.

36. The following are some of the questions which we have considered or have under consideration—

(a) whether the law should be changed so that an illegitimate child becomes legitimated by the subsequent marriage of its parents, in cases where the parents were not free to marry at the date of the child's conception or birth;
(b) whether an accused person should be able to recover expenses from the prosecution in cases where he has been acquitted or the charge against him has been dropped;
(c) whether the power of the High Court of Justiciary to modify sentences on appeal should be enlarged;
(d) whether the powers of Courts to hear cases in private should be extended or reduced and whether there should be any changes in the Judicial Proceedings (Regulation of Reports) Act 1926;
(e) whether any change should be made in the law relating to private prosecutions;
(f) whether section 9 of the Trusts (Scotland) Act 1921 should be amended so as to remove certain anomalies and inconsistencies;
(g) whether the Scottish "Confirmation" of executors should be brought into line with the English "Probate" so as to remove the need for specification of the separate items of estate;
(h) whether there should be prescribed by statute certain presumptions relating to the age at which persons cease to be capable of procreation; and
(i) whether Crown precognitions should be made available to an accused person or his legal advisers.

Section 3(1)(f)—"to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions."

37. We fully appreciate the value of comparative study in the search for solutions to our legal problems. We have been able to make use of the facilities of the British Institute of International and Comparative Law, and we wish to

express our appreciation of the work done by the Institute on our behalf. The comparative material in the Law Library of the University of Edinburgh has also been made available to us and for this we are most grateful. Through the visits of our Commissioners and staff to England and the Continent as well as by correspondence and visits which have been paid to us, we have established contact with individual lawyers in the Commonwealth, in Europe, and in the United States, and we have benefited much from the information they have provided for us. We look forward to the strengthening and extending of these contacts in the future.

CONSULTATION

38. One of the problems which concerned us initially was at what stage in any matter we should consult the legal profession and other bodies. We took the view that it would serve little useful purpose to ask for views in general on a particular subject, and we decided accordingly that, at least so far as our "programme" subjects are concerned, we should formulate our tentative proposals which could then be sent to the appropriate bodies for their observations. Thus the attention of the bodies concerned would be focussed on changes we proposed to recommend. We felt, however, that at an earlier stage it would be desirable for us to have the views of practitioners who were experienced in the matters under consideration, and we were able to arrange with the Faculty of Advocates and with the Law Society of Scotland a procedure under which we may obtain from members of each of these bodies informal views as to the probable reaction of the profession. In the light of these views we are then able to reconsider our proposals. This does not take the place of formal consultation which will come later, but it enables us to obtain quickly the views of some of those who are concerned in their daily practice with particular aspects of the subjects which we are considering. We have also had the benefit of informal advice on various matters from the Royal Faculty of Procurators in Glasgow and from individual members of each branch of the profession. To all these bodies and individuals we wish to express our thanks, and our hope that their co-operation with us will be continued and developed in the future.

39. We also hope that as our work proceeds we may take advantage of this procedure by consultation on a similar basis with other professions and organisations of every kind.

40. We must also record our appreciation of the guidance and assistance which has been given to us so generously by all the Government Departments with which we have had dealings. Our closest contacts are, of course, with the Scottish Departments—those of the Secretary of State and of the Lord Advocate—and we believe that we have established with them a good working relationship which it will be our endeavour to maintain and to foster.

41. We have already referred to our co-operation with the Law Commission, and, as provided in section 3(4) of the Law Commissions Act, we are in constant consultation with them on matters of common concern to the two Commissions. We are working together but, although both Commissions have expressed their intention to seek unity or harmony between the law on each side of the Border in matters where this is appropriate, there is no question of simply merging the one law into the other. There are many aspects of the law of Scotland which are closely bound up with the history, the traditions, and the

character of the Scottish people and these we shall, provided they are still relevant to the needs of today, be vigilant to preserve. There are also large areas of the law such, for example, as those relating to commercial contracts in which distinctions in this day and age may be unrealistic and, perhaps, positively harmful. It is in such areas that we feel that unification or harmonisation may prove to be particularly desirable, the new law being formed by proper use of comparative methods. Consideration must, of course, be given, in choosing solutions, to what is best in the existing legal systems of Scotland and England, but we attach importance to the solution of other jurisdictions which may be more acceptable than either as a basis for reform. We do not, of course, overlook the possibility that similar solutions may be achieved in different systems by different methods, and that in practice the methods of approach deserve almost as close consideration as the prescribed solutions. It may be looking a long way ahead but we may one day see a common mercantile and commercial code regulating all internal and international relationships throughout the civilised world.

42. We have also established contact with the Director of Law Reform in Northern Ireland. His ties with the Law Commission are naturally stronger, but we have profited from our consultation with him. The Chairman addressed the Law Society of the Queen's University, Belfast, on the subject of Law Reform on 4th March, 1966 in the presence of the Lord Chief Justice of Northern Ireland and a number of the Judges and Professors.

43. There has not been time in this first year to make contact with many of the other Law Reform Organisations in the Commonwealth and elsewhere, but we hope to be able to accomplish more of this in the years to come. A start has been made, and we are happy to record in particular our good relationship with the Ontario Law Reform Commission whose Director paid us a visit last summer, and whom our Chairman hopes to visit this autumn. It may be possible at the same time to arrange personal contact with bodies in the United States which are concerned with Law Reform. The Chairman has also had the advantage of receiving advice on several occasions from Mr. Justice Walsh, of the Irish Law Reform Committee, as to certain aspects of the law of the Republic of Ireland.

Conclusion

44. One of the requirements, as we think, of the Scottish Law Commission is that our work shall, so far as possible, be intelligible and acceptable to the general public, in whose interests, fundamentally, all our work is done. That our work should be intelligible calls for a constant reminder to the public that recommendations of an apparently technical or even abstract nature will, if adopted, have the effect of improving and modernising the law in such a way as directly to affect the man in the street, and to put his personal, family or commercial relationships on a fairer and more favourable footing. That our work should be acceptable may be a consequence which follows upon, first, its continuous nature; continuous review of the whole field of law by a body with statutory powers has never before been attempted in this country. Secondly, the Commission are accessible; this is demonstrated by the high proportion of our work which has its origins in the suggestions made by ordinary citizens. Thirdly, the Commission are independent; this may, constitutionally, be the most important of our attributes.

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